Howard Johnson Motor Lodge *and* Chauffeurs, Teamsters and Helpers Local Union No. 364, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 25-CA-13009 and 25-CA-13570

May 13, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On December 4, 1981, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act when Respondent's manager, William Collins, ordered employee Dennis Mark to remove his union button, when Collins interrogated Mark, and when Collins threatened Mark. We base our agreement on a determination that, contrary to Respondent's contention, Mark was not a supervisor.

Mark testified that he was "head of maintenance" and that he had five men "under" him. Respondent's maintenance staff was arranged into three shifts: Mark and two other men worked from 7 a.m. to 3 p.m.; one man worked from 3 to 11 p.m.; and one man worked from 11 p.m. to 7 a.m. Three of these men (one on Mark's shift and the sole men on the other two shifts) were drivers. Their job was to drive people from the motor lodge to the airport and truck terminal and back again. These drivers took their assignments from the front desk clerk. Their driving duties took up 6 to 7 hours of their shifts. They spent their remaining time doing routine maintenance tasks such as taking out the garbage and replacing burnt-out light bulbs. Thus, although the drivers were nominally "under" Mark, his contact with them was minimal. The other two men "under" Mark were Thomas Rospopo, the weekend maintenance man, and Charles Springer, the former head of maintenance. Springer worked part time and made 50 cents per hour more than Mark.

In addition, Mark did not have the power to hire, fire, transfer, layoff, suspend, or promote Respondent's maintenance employees or effectively to recommend such actions. Although Mark did assign some work to the rest of the maintenance staff by leaving notes for them, these assignments were of a routine nature and Mark did not exercise independent judgment in making them.

Finally, Collins himself testified that he did not consider Mark to be a supervisor.

On the basis of all of the above, we find that Mark was at best the first among equals and not a supervisor as that term is defined in Sec. 2(11) of the Act.

In adopting the Administrative Law Judge's conclusion that the discharge of Supervisor Paquin violated Sec. 8(a)(1) of the Act, we rely on the fact that Paquin was discharged for, in essence, refusing to engage in surveillance of employees' union activity for Respondent. To discharge a supervisor for refusing to engage in unfair labor practices itself violates the Act. See, e.g., *Russell Stover Candies, Inc.*, 223 NLRB 592 (1976), enfd. 551 F.2d 204 (8th Cir. 1977); see also *Miami Coca Cola Bottling Company doing business as Key West Coca Cola Bottling Company*, 140 NLRB 1359 (1963), enforcement denied on other grounds 341 F.2d 524 (5th Cir. 1965). The fact that Respondent made its demand after Paquin had already voluntarily attended the union meeting does not distinguish this case from cases like *Russell Stover*, since Respondent here likewise sought to compel its supervisor to report on the union activity of its employees.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Howard Johnson Motor Lodge, South Bend, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

. PRELIMINARY STATEMENT; ISSUES

STANLEY N. OHLBAUM, Administrative Law Judge: These consolidated cases[1] prosecuted under the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (herein called the Act), were litigated before me in South Bend, Indiana, on August 31 through September 1, 1981, with Howard Johnson Motor Lodge herein called (Respondent Employer) participating throughout by its counsel, the Board's Regional Director for Region 25 through his counsel, and Chauffeurs, Teamsters and Helpers Local Union No. 364, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Charging Party herein called the Union) making no appearance. All appearing were given full opportunity to present evidence and arguments, as well as to propose findings and conclusions and file posttrial briefs. After unopposed application by counsel for Respondent for time extension, briefs were received from Respondent and from counsel for General Counsel of the Board by November 3, 1981. Those briefs, as well as the entire record, have been carefully reviewed.

The principal issues presented are whether Respondent engaged in various acts (interrogation; direction not to wear union buttons; engaging and attempting to have an employee engage in espionage on union meetings; discharging the employee for refusing to do so and for testifying in a Board-conducted union representation proceeding; threatening employees that no union would be permitted, and threatening employees with reprisals for engaging in union activity; reprimanding an employee and imposing more onerous working conditions because

[1] Complaint issued February 11, 1981, based on a charge (Case 25-CA-13009) filed by the Union on December 30, 1980. Complaint issued June 8, 1981, based on a charge (Case 25-CA-13570) filed by Union on May 26 as amended June 8, 1981. The complaints, issued by the Regional Director for Region 25, were consolidated by on August 19, 1981.

of union activity) in violation of Section 8(a)(1), (3), and (4) of the Act.

Throughout this Decision, Case 25-CA-13009 will be referred to as C-1 and Case 25-CA-13570 as C-2.

Upon the entire record[2] and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times Respondent has been and is a Maryland corporation, with its principal office in Braintree, Massachusetts, engaged in operating a motor-lodge in South Bend, Indiana. In the course and conduct of its business operation during each of the representative 12-month periods immediately preceding issuance of the complaints, Respondent purchased and received at its said South Bend facility, directly in interstate commerce from places outside of Indiana, goods and materials valued at over $50,000, and derived gross revenues there exceeding $500,000.

I find that at all material times Respondnt has been and is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that at all of those times the Union has been and is a labor organization as defined in Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent's South Bend motel is managed by William Collins and at the time of the hearing employed about 23 persons. Around November or December 1980, when the actions herein complained of started, there were about 18 employees, consisting of 6 or 7 chambermaids or housekeepers, 5 maintenancemen, 1 housekeeping supervisor, and 5 front-desk personnel.

Union organizational activity involving the South Bend motel employees took place in and after November 1980, including union meetings attended by those employees, solicitation of employees by fellow-employees to join the Union, and wearing of union buttons. A preelection representation case hearing was held under auspices of the Regional Director for Region 25.

B. *Respondent's Alleged Activities in Violation of the Act*

1. Proscription of union button display

During November 1980, Respondent's former maintenanceman Dennis James Mark (now elsewhere employed) attended all of the union organizational meetings, displayed a union slogan on his car parked in the motel parking lot, wore a union button at work,[3] distributed such buttons to other employees, and solicited employees to join the Union. Later in the day when Mark had distributed these buttons, while repairing a faucet in a guest room, he and chambermaid Rose Leeper were directed by Motel Manager Colling to "take off the button . . . we don't wear them here. . . . I don't want you wearing that button on the premises." Leeper removed it, but Mark replied that he thought it was his right to wear it. Although Collins warned, "Don't wear them at Howard Johnson's," Mark continued to wear his union button unitl the end of his shift, around 3 p.m., when Collins asked him into his office, where, in the presence of two other employees—front desk clerk Susan Callan and Housekeeping Supervisor Sandra Lee Paquin—Collins directed Mark to "Take the button off or else." Since it was quitting time, Mark left, but he apparently did not wear the button at work after that.

Credited testimony of General Counsel witnesses Thomas E. Rospopo and Susan Callan, both formerly employed as Respondent's motel desk clerks (Rospopo also as a weekend maintenanceman), further establishes that in early December Rospopo, who had successfully solicited many fellow-employees to sign union cards, also was directed by Motel Manager Collins to "Take off that [union] button. We don't wear that here." At the time, Rospopo was wearing a company-furnished blazer with the company emblem. When Rospopo complied, Collins remarked, "That's better, Tom." Collins was also observed asking other employees to remove their union buttons, as well as union stickers from carts. A few days later Collins told Callan that he was "glad the union craze hadn't caught on with all the employees, meaning buttons."

Also in December, as credibly testified by Respondent's desk clerk, Laura Fay Horvath, still in Respondent's employ,[4] when Manager Collins observed a union button on her purse beneath the desk counter, Collins told her, "We don't wear that kind of pin on our property," so she removed it.

Testifying on this subject, Respondent's Motel Manager Collins conceded he instructed these employees to remove their union buttons since, as his own personal "policy" applicable to "all" buttons but not reflected in company policy or anywhere in writing, "they were not acceptable parts of the uniform" and might be regarded adversely by guests. Although Collins indicated that Horvath's button on her purse below the counter was visible to a guest checking in, comparing testimonial demeanor as observed, I prefer and credit the contrary testimony that it was *not* so visible. At no time, even according to his own testimony, did Collins take the position with regard to maintenanceman Mark that the latter was a supervisory employee or other than a rank-and-file employee;[5] as to the other employees (except Paquin,

[2] Certain errors in the transcript are hereby noted and corrected.

[3] Mark wore the union button on his own vest, even after he received a company-supplied jacket about 2 weeks later.

[4] Corroborated by Respondent's former Housekeeping Supervisor Paquin, who also swore that Horvath's purse under the counter was not visible from above.

[5] Respondent *now* contends, *in the instant proceeding*, that its actions (*supra* and *infra*) relative to Mark could not in any event have been violative of the Act since Mark was a statutory supervisor. Although the testimony of Mark here could arguably, but not necessarily, support the con-

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who is not involved in this aspect of the case), it is conceded that they were rank-and-file employees.

Inasmuch as employees have the right to wear union buttons at work where, as here, they interfere neither with the employees' job nor the conduct of the Employer's business,[6] and it is undisputed that Respondent did indeed direct its employees not to display such buttons on their clothes or otherwise on Respondent's premises, I find that, substantially as alleged in the complaint (C-1, par. 5(b)), Respondent through its Manager Collins directed employees not to display union buttons.

2. Interrogation

The complaint (C-1, par. 5(a); C-2, pars. 5(a)(iii), 5(c), and 5(d)) alleges that on various occasions from November 1980 through April 1981 Respondent impermissibly interrogated employees regarding their own and fellow-employees' union membership, views, and activities. Various employees testified in support of these allegations.

Respondent's former housekeeping supervisor, Sandra Lee Paquin, testified credibly that on November 21, 1980, she was summoned to the office of Motel Manager Collins, where, in the presence of Respondent's attorneys Callanan and Gaucher, she was told "a union [is] trying to get in" and was asked what the employees were "unhappy about" and whether she and was asked what the employees were "unhappy about" and whether she had "heard any union talk." She denied (untruthfully) that she had heard any such talk, but indicated employees were unhappy over their pay and supply shortages. She was instructed not to discuss the Union with employees, but, if asked, to tell them they did not need a union. She was also instructed to report any union activity.

Inasmuch as it is conceded that Paquin was a supervisor within the meaning of the Act, I find that Respondent's described questioning of and instructions to her on November 21, 1980, were not violative of the Act. It is not unlawful under the Act for an employer to request or require such information from a supervisor.

On December 17, 1980, Paquin was again summoned by Motel Manager Collins for a conference with Respondent's attorney, Callanan, this time in a motel executive suite, where Callanan asked her if she had attended union meetings and signed a union card. Paquin admitted she had, but denied involvement in union organizing activity. She refused, then and again later (resulting in her discharge, as detailed *infra*, to comply with Callanan's direction that she disclose the identities of those she had observed to be present at the union meeting or meetings she had attended.

Since, as already indicated, Paquin was concededly a supervisor, I find that it was not violative of the Act for Respondent to question her as described.

Respondent's discussions with or interrogations of employees concerning union membership and affairs was not, however, confined to questioning Supervisor Paquin. Credited proof establishes that it also discussed such matters with or interrogated rank-and-file employees concerning these subjects. Thus, after a company-convoked assemblage of employees early in January 1981, addressed by Respondent Regional Representative Richard J. Moreau to dissuade them from union affiliation (according to Moreau's testimony), Motel Manager Collins asked desk clerk Susan Callan what she thought about Moreau's remarks. Callan did not respond other than to indicate that it was odd that Respondent now for the first time appeared to be paying attention to its employees. When Collins asked her how she thought the upcoming Board-conducted union representation election would turn out, Callan replied noncommitally. I fail to

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clusion that Mark was a supervisor, it is to be noted that in the Board-conducted representation case linked to this proceeding Respondent explicitly took the position—in its *Excelsior* list of employees furnished by it to the Board, as well as in an affidavit (G.C. Exh. 15), and also in its testimony and position to the Board at the hearing in that case (G.C. Exh. 14)—that Mark was *not* a supervisor, on the basis of which Respondent succeeded in persuading the Board that Mark was a nonsupervisory employee and thus eligible to vote in that election. Further, notwithstanding the current contention of its counsel, even at the instant hearing Respondent's Motel Manager Collins explicitly swore that he does not regard Mark as a supervisor. Moreover, as already indicated above, at no time when Respondent's Manager Collins directed Mark to remove his union button—nor at any other time, including during Mark's activities in enlisting other employees to join the Union—did Collins or any other agent or representative of Respondent indicate that Mark should desist from such activities because it regarded him as a supervisor. Under these circumstances, there would be ample warrant for not regarding Mark as a supervisor; or, alternatively, for treating Respondent as estopped from now so maintaining, contrary to its earlier sworn assurances to the Board.

However, there is no need here to resolve the question of whether or not Mark was a supervisor within the statutory definition. The Act permits union membership by supervisors. See Sec. 14(a) of the Act. See also *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790, 795, 808 (1974); *N.L.R.B.* v. *Valentine Sugars, Inc.*, 211 F.2d 317 (5th Cir. 1954); *Party Cookies, Inc.*, 237 NLRB 612, 623–624 (1978). Thus, it was not unlawful for Mark to simply wear his union button—even though, if he was indeed a supervisor within the meaning of the Act, Respondent could have required him to remove it (which he apparently did, at work) or discharged him for wearing it (which it did not do), without violating the Act. Cf. *Florida Power & Light Co., supra; DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980). In any event, Respondent's proscription of union button display by its other employees under the circumstances here shown was done in order to thwart them in their protected concerted activities and was violative of the Act. See fn. 6, *infra*.

[6] *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793 (1945); *Sierra Development Company d/b/a Club Cal-Neva*, 231 NLRB 22, 28–29 (1977), enfd. 604 F.2d 606 (9th Cir. 1979); *Howard Johnson Company*, 209 NLRB 1122 (1974); *Glenlynn, Inc., d/b/a McDonald's Drive-In Restaurant*, 204 NLRB 299 (1973); *Consolidated Casinos Corp., Sahara Division*, 164 NLRB 950 (1967); *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484, 1486 (1962), enfd. as modified in other respects 318 F.2d 545 (5th Cir. 1963); *Mayrath Company*, 132 NLRB 1628 (1961), enfd. as modified in other respects 319 F.2d 424 (7th Cir. 1963). *N.L.R.B.* v. *Harrah's Club*, 337 F.2d 177 (9th Cir. 1964), relied on by Respondent—aside from whether or not consistent with the Supreme Court's decision in *Republic Aviation, supra*—involved, unlike here, mere continued application by the employer of a longstanding, rigorously enforced rule, in absence of evidence of employees being engaged in protected concerted activity.

Respondent's argument that it was justified in proscribing union button wearing by its employees because it feared that some of its customers or potential customers might react adversely or withhold their trade, is without merit. Respondent could as well argue that it is for that reason permitted to operate, and publicize that it operates, a "non-union motel." (Of course, it may conversely be conjectured that some of Respondent's potential customers might react favorably to employees wearing union buttons.) The lawfulness of the exercise by employees of their rights under the Act, including union button wearing, does not turn upon the pleasure or displeasure of an employer's customers. Cf., e.g., *Motz Poultry Company*, 244 NLRB 573, 576 (1979); *International Union of Electrical, Radio and Machine Workers, AFL-CIO [NECO Electric Products Corp.]* v. *N.L.R.B.*, 289 F.2d 757, 762–763 (D.C. Cir. 1960); *Ref-Chem Company*, 153 NLRB 488, 491 (1965); *Aero Corporation*, 149 NLRB 1283, 1284 (1964), enfd. 363 F.2d 702 (D.C. Cir. 1966), cert. denied 385 U.S. 973.

discern in any of the foregoing, interrogation of a coercive character or otherwise violation of the Act.

Credited testimony of Respondent's former desk clerk and weekend maintenanceman Thomas E. Rospopo establishes that after the above-described early January employer-convoked employees assemblage, he was approached and asked by Respondent's Regional Representative Moreau why, "as a past management employee" (Rospopo had previously been a managerial trainee at a different location, a status he had, for reasons of his own, relinquished), he had "let this kind of [unionizing activity] occurrence happen at the motor lodge at South Bend" and "not let somebody [in management] know there was some sort of a problem at the Howard Johnson at South Bend, as to why a union campaign was coming." I find this to have been an impermissibly unwarranted intrusion into Rospopo's and employees' protected concerted affairs and activities under the Act.[7]

Another rank-and-file employee, chambermaid or housekeeper Rose Leeper, testified credibly that in and after December 1980, Motel Manager Collins repeatedly—two or three times weekly—asked her if she knew or had heard anything about the union and what the talk was on that subject, as well as what she knew about who was responsible for the union stickers on employees' automobiles and maids' carts. Leeper denied knowledge of any of these things. Also, in January 1981, on an occasion when fellow-employee and union activist Dennis James Mark (from whom Leeper had received a union button) had driven her home from work, she received a telephone call at home from Manager Collins, who asked her what Mark had talked to her about on the way home. She said, "I didn't discuss anything with him."

Although the foregoing stands substantially undisputed by Collins, as to the latter incident he claims he telephoned Leeper only out of solicitude for her welfare in order to ascertain if "she had gotten home all right." I have difficulty in accepting this, particularly since he did not directly deny that he asked Leeper what Mark had talked to her about—although, according to his testimony, he asked her "if Dennis [Mark] had caused her any problems on the way home." As to the other interrogational episodes, based on close testimonial demeanor observations, I reject Collins' testimony that he at no time mentioned the Union to Leeper; instead, I definitely prefer and credit the testimony of Leeper—a singularly impressive witness on the stand—as recounted above, and accordingly find that Collins did indeed interrogate Leeper as she testified.

Further, Respondent's housekeeper Barbara Jane Litler, still in its employ and thus testifying at risk of retaliation,[8] credibly swore that in late March or early April 1981 her supervisor, Head Housekeeper Edith Parker (Paquin's successor), after remarking to her that employee Dennis James Mark had "talked to . . . some of the new girls about the union dues . . . out of their . . . pay check, each month" and that she [Parker] had "told the girls there wasn't no union in there, not to worry about it," then asked Litler whether she (Litler) or any other girls had had any union dues taken out of their checks yet, which Litler answered in the negative. This impresses me as a crudely disguised attempt at interrogation, intended to elicit either a response that Litler (or others) had indeed had or expected to have that done, or that they had not joined the Union—plain interrogation. I find that the latter inquiry, being in essential substance undisputed by Parker—who testified she asked Litler, "They haven't deducted anything from your pay, have they, Barb[ara]"—constituted an unwarranted and intrusive inquiry designed to elicit from Litler whether she had affiliated herself with the Union.

Finally, it is alleged (C-2, par. 5(a)(iii)) that or or about April 22, 1981, Motel Manager Collins engaged in additional interrogation, shown at the hearing to have been of its employee Dennis James Mark, who testified credibly that on that date he was summoned to the office of Collins who asked him, "who in hell [do you] think [you are] taking it upon [your]self to talk to the employees about the union and what has gone on here in the past."[9] Mark did not respond. The foregoing is not essentially disputed by Collins. It is found that Collins impermissibly interrogated Mark on this occasion, as alleged.

3. Threats

The complaint (C-2, par. 5(b)) alleges that late in November 1980 Motel Manager Collins threatened its employees with reprisals for union activities. Since counsel for General Counsel conceded upon the record that no proof was supplied here in this regard, I find the allegation not established.

The complaint (C-2, pars. 5 (a)(i) and (ii)) further alleges that on or about April 22, 1981, Collins also threatened employees with reprisals for engaging in union activities and that Respondent would never permit a union at the motel. On this subject, Respondent's former em-

[7] Respondent's affirmative defense as to the foregoing complaint allegation (C-2, pars. 5(d) and 4, as amended), that it is untimely under Sec. 10(b) of the Act, is overruled and dismissed. The allegations in question, added by amendment of August 19, 1981, are directly related to and part of the transactions described in the complaint (C-2) issued on June 8, 1981, growing out of the charge filed on May 26 as amended on June 8, 1981. Those allegations merely additionally identify Moreau as an officer of Respondent—a purely perfunctory and perhaps unessential pleading allegation—and set forth an additional alleged instance of interrogation on January 7, 1981. The complaint (C-2) was clearly timely issued and there is no contention to the contrary. Where an amendment to a complaint is, as here, merely an extension of or directly relates to the matters involved in the charge and alleged in the complaint, it is not time-barred simply because the amendment refers to an incident more than 6 months antedating the amendment. Cf., e.g., *N.L.R.B.* v. *Fant Milling Company*, 360 U.S. 301 (1959); *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940); *N.L.R.B.* v. *Kohler Company*, 220 F.2d 3, 7–8 (7th Cir. 1955); *N.L.R.B.* v. *Dinion Coil Company, Inc.*, 201 F.2d 484, 491 (2d Cir. 1952); *Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (J. J. White Ready Mix Concrete Corp.)*, 141 NLRB 424, 431–432 (1963); *Exber, Inc., d/b/a El Cortez Hotel* v. *N.L.R.B.*, 390 F.2d 127, 129–130 (9th Cir. 1968).

[8] We have been judicially instructed that this is a factor to be weighed in favor of crediting such a witness. See *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962); *W. Willard Wirtz* v. *B. A. C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1962).

[9] Again, in no way did Collins state, indicate, or suggest that Mark was a supervisor or so regarded by Respondent, or that his activities were disfavored by Respondent for this reason. See fn. 5, *supra*.

loyee Dennis James Mark's credited[10] testimony establishes that on that date, on the same occasion when Collins demanded to know "who in hell [do you—i.e., Mark] think [you are] taking it upon [your]self to talk to the employees about the union," Collins directed him not to speak to a named employee about the Union and added that "There [is] no union and there will never be no union here at Howard Johnson's" and that "If [you don't] stop talking to new employees about the union, [you'll] be in deep, deep trouble." In no way did Collins limit this direction to working time. Upon the basis of Mark's credited testimony, within the frame of reference of the record as a whole, I find these allegations established.

4. Reprimand

The complaint (C-2, pars. 6(a) and (c)) alleges that on or about February 16, 1981, Respondent issued an unwarranted written reprimand to Dennis James Mark because of his protected concerted union activities.

As to this, Mark, a known union activist and protagonist among Respondent's employees, testified that when he returned to work on Monday, February 16, 1981, after having missed work on Friday, February 13, because of a knee derangenent impeding ambulation, he was handed a written reprimand (G.C. Exh. 4(d)) by Motel Manager Collins. Although Mark concedes he failed to telephone in on Friday, February 13, to apprise Respondent he could not come to work, he claims that another maintenanceman, Charles E. Springer, told him that he (Springer) had likewise not called in when he failed to report to work during the preceding week, without receiving a reprimand. When Mark complained to Collins about this allegedly disparate treatment, Collins reminded him that he had allegedly been warned before for tardiness. (According to Collins, on that previous occasion he had told Mark that a callin was required in such circumstances.) Called as Respondent's witness, Springer, its former maintenance supervisor now working for it as a Social Security annuitant, testified that he called in when he was absent during the preceding week. Called as a rebuttal witness by General Counsel, Respondent's desk clerk Susan Callan testified that Springer did not call in and that when she asked Collins why Springer was not there on the day in question, Collins responded that he did not know.

Although I credit Callan's described testimony, it certainly is possible that Springer may nevertheless have called in and spoken to somebody other than Callan or Collins, or that Springer called in after the described conversation between Callan and Collins.

Since I am neither satisfied that the described reprimand meted out to Mark was disparate, unjustified, or tied to his union activity, I find the allegation in question not established by preponderating substantial credible evidence as required.

[10] See fns. 5 and 9, *supra*. Based on my comparative testimonial demeanor observations, I credit Mark's assertions, in preference to Collins' denials, that Collins told Mark there would never be a union in the motel.

5. Imposition of more arduous work

The complaint (C-2, pars. 6(b) and (c)) alleges that, because of his protected concerted activities, Respondent "imposed more arduous and less agreeable working conditions" on employee Dennis James Mark "by requiring him to maintain a daily log sheet reflecting the work he performs."

According to Mark's testimony, when Manager Collins instructed him to hand in "a daily log sheet of everything you do"—which Collins admits he did, without, however, in any way indicating this pertained to or included Mark's off-duty or nonworking time activities—Collins preceded this requirement with the statement that it was being imposed "since [you—i.e., Mark] have so much time to talk to new employees about the union and everything."

Again, while there is no significant testimonial factual conflict regarding this matter, there is, in my view, insufficient warrant for assuming that the requirement was imposed in retaliation for or because of Mark's union activity. The requirement for merely handing in his log (which he had all along, as required, anyway been keeping) of the maintenance work performed by Mark did not encompass his recording off-duty, nonworking time or breaktime activities, which he remained legally free to conduct, including union organizing of other employees on nonworking time, without recording in the log. Under the circumstances presented, I am unprepared to conclude that Respondent could not, in the exercise of its managerial prerogatives, require an employee to hand in work logsheets he was maintaining—even if it wished to single him out because it suspected (with apparent reason, as admitted by Mark at the hearing, in the case of fellow-employee Debbie Skwarkin, whom he solicited while he but not she was on breaktime) that he was misconducting himself by engaging in union organizing activity during working time. I accordingly find this allegation of the complaint not sustained.

6. Attempt to enlist employee to engage in espionage on union meetings and discharge of employee for refusal to do so

The complaint (C-1, pars. 5(c), and 6(a) and (b)) also alleges that on or about December 17, 1980, Respondent attempted to enlist an employee to engage in espionage on its employees' union meetings and discharged the employee for refusing to do so.

The employee in question was Sandra Lee Paquin, who was concededly a supervisor (head housekeeper) of Respondent. The material facts are not in essential dispute. Paquin concedes that she attended union meetings (which she had the right to do, so long as not acting as an espionage agent of her employer). Respondent concedes that Paquin acknowledged to it under its questioning (which Respondent had the right to do, *supra*)—after denying it (untruthfully) at an earlier discussion with her employer—that she had done so. Respondent concedes that it insisted that Paquin disclose to it the identities of its employees observed by Paquin at that meeting or those meetings. Paquin concedes that she refused to do so. It is undisputed that it was not until Paquin twice re-

fused to "finger" the employees at those meetings—the second time, when recalled to the interview, by Respondent's attorney and vice president for labor relations, Callanan, for the express purpose of giving her another opportunity to comply with Respondent's requirement that she disclose the names of the other employees at those meetings—that she was then and there precipitately discharged after her continued refusal to supply that information.

Then and now contending that it had the absolute right to require Paquin to disclose the identities of other employees she had observed at the union meetings, Respondent's position is bottomed on her being a supervisor and therefore required to demonstrate total "loyalty" to her employer. While I agree that an employer has the right to total loyalty from its supervisors, as well as from all other employees, I cannot agree that loyalty encompasses requiring a supervisor to engage or participate in violation of the Act, or entitlement by the employer to share in the forbidden fruits of what would have been its own violation of the Act if directed by it. At no time did Respondent indicate to Paquin that she was not required to furnish this information;[11] on the contrary, Respondent made it plain that her job depended on it. It was only after Paquin had refused to reveal the names of employees whom she had observed attending the union meetings, and after she again refused to do so when recalled to the executive suite for the same purpose, that she was discharge. The fact that Paquin had not attended the union meetings at the behest of her employer did not give her employer the right to insist upon information to which it was not entitled and which it would clearly have been unlawful for it to direct Paquin to obtain. While it is also clear that Respondent could lawfully have discharged Paquin, as a supervisor, for attending union meetings,[12] the fact remains that it did not do so—it discharged her only after and because she declined to identify employees (other than herself) whom she observed at those meetings. Under the circumstances, I find that the true and controlling reason for Respondent's discharge of Paquin was her refusal to identify the employees she observed attending union meetings—that is, to divulge to Respondent the results of that which it was lawful for her to do *viz*, attend union meetings of her own volition, not for surveillance purposes) but which it would clearly have been unlawful for Respondent to require her to do; i.e., to conduct surveillance over a private union meeting or meetings of employees on their own time, as distinguished from while on working time.[13] It is also unlawful for an employer to require a supervisor to divulge such information to the employer when, as here, gained by a supervisor who voluntarily and without direction of the employer attends a union meeting, since the supervisor has the right to attend such a meeting on his own time for nonsurveillance purposes (and even to join the union, if admitted to membership).[14] To sanction requiring a supervisor to divulge the identities of other employees observed by him at such a union meeting would directly interfere with, restrain, and coerce other employees in the exercise of their Section 7 rights,[15] since it would thereby permit the employer to acquire confidential organizational information, concerning its employees' protected concerted activities, to which the employer is not entitled. Under the circumstances, I find that, by requiring Paquin to disclose the names as indicated and by discharging her because she declined to divulge them, Respondent violated Section 8(a)(1), but not Section 8(a)(3), of the Act, as alleged in the complaint.[16] Cf. *Russell Stover Candies, Inc.* v. *N.L.R.B.*, 551 F.2d 204 (8th Cir. 1977); *N.L.R.B.* v. *Vail Manufacturing Company*, 158 F.2d 664 (7th Cir. 1947), cert. denied 331 U.S. 835; *Gerry's Cash Markets, Inc., d/b/a Gerry's I.G.A.*, 238 NLRB 1141, 1151 (1978), enfd. 602 F.2d 1021 (1st Cir. 1979); *Belcher Towing Company*, 238 NLRB 446, 447 (1978), enfd. as modified in other respect 614 F.2d 88 (5th Cir. 1980); *Meat Packers International*, 225 NLRB 294, 305 (1976); *Buddies Super Markets*, 223 NLRB 950 (1976), enforcement denied 550 F.2d 39 (5th Cir. 1977); *General Nutrition Center, Inc.*, 221 NLRB 850 (1975); *Donelson Packing Co., Inc. and Riegel Provision Company*, 220 NLRB 1043 (1975); *Rohr Industries, Inc.*, 220 NLRB 1029, 1035-39 (1975), and cases cited; *The Permian Corporation*, 189 NLRB 860, 864 (1971), enfd. 457 F.2d 512 (5th Cir. 1972); *I.D. Lowe, d/b/a Thermo-Rite Mfg. Co. d/b/a Ken-Tool Mfg. Co.*, 157 NLRB 310, 322 (1966), enfd. 406 F.2d 1033 (6th Cir. 1969).

7. Discharge of employee for testifying in NLRB proceeding

It is, finally, alleged (C-1, pars. 6(c) and 9)) that Respondent further violated the Act by discharging an em-

[11] Cf., e.g., *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enforcement denied on other grounds 344 F.2d 617, 619 (8th Cir. 1965); *Preston Products Company, Inc.*, 158 NLRB 322, 348-351 (1966), enfd. 392 F.2d 801, 809 (D.C. Cir. 1967), cert. denied 392 U.S. 906 (1968); *Surprenant Manufacturing Co.* v. *N.L.R.B.*, 341 F.2d 756, 762-763 (6th Cir. 1965)

[12] See, e.g., *St. Anthony's Center*, 227 NLRB 1777, 1787 (1977).

[13] Cf. *Rike's a Division of Federated Department Stores, Inc.*, 241 NLRB 240, 243 (1979); *Emerson Electric Company*, 177 NLRB 75, 87 (1969), and cases cited. But cf. *Elm Hill Meats of Owensboro, Inc.*, 205 NLRB 285 (1973); *Cannon Electric Company*, 151 NLRB 1465 (1965).

[14] This is not to say, as already indicated, that a supervisor may not be discharged, without being entitled to the Act's protection, for attending such a meeting or joining the union, since he is not an "employee" within the Act's definition. See Sec. 2(3) of the Act.

[15] There is ample evidence, through credited testimony of a number of employee witnesses, that the employees were aware of what had occurred involving Respondent's attempts to compel Paquin to "finger" them.

[16] Respondent's contention that it is entitled to the information demanded of Paquin in order to establish "supervisor taint" of the cards of other employees at the meeting is unsound. Mere knowledge of who was present at a union meeting would not establish "supervisory taint." Furthermore, all employees were entitled to voice their preferences—union or no union—through their secret ballots cast at the subsequent Board-conducted representation election. Although Respondent's counsel and vice president for labor relations, who conducted the questioning of and made the described demands upon Paquin, at no time gave any indication to her that he had any such motive, and at no time disavowed to its employees any such supposed role on the part of Paquin, "supervisory taint"—to the extent that such a contention may be available to an employer (cf., e.g., Leventhal, J., in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Aero Corporation)* v. *N.L.R.B.*, 363 F.2d 702, 707-708 (D.C. Cir. 1966), cert. denied 385 U.S. 973—may be established in *lawful* ways, such as through objections to an election and evidence at a representation case hearing.

ployee for giving testimony in a Board-conducted representation case (Case 25-RC-7570) preceding the representation election held to determine the union representational desires of Respondent's South Bend motel employees.

The employee involved is, again, Paquin, who testified in that proceeding on November 24, 1980. She testified at the request of the Union, without subpoena, and completed her testimony during her lunch hour without missing any time from work. It is stipulated that Respondent learned within a few days thereafter about her testifying—not later than November 28, 1981. Respondent of course denies that Paquin she was discharged for this reason.

While Section 8(b)(4) of the Act does not require that testimony before the Board be required or in response to subpoena, I have difficulty, upon the record presented, in linking Paquin's testifying on November 24 with her discharge almost a month later, on December 17, particularly when it seems to me quite clear that the propelling, proximate cause of that discharge was Respondent's irate refusal on that date to accept her unwillingness to disclose the identities of employees she had observed the union meetings. Furthermore, even were Paquin's discharge to have been in part attributable to her testifying on November 24—a conclusion I would regard as speculative—a finding to that effect would not alter the remedy here required by reason of her discharge.

Upon the record as a whole, I find this allegation of the complaint not established by substantial evidence.

C. *Recapitulation of Findings*

The following chart recapitulates the foregoing findings:

Complaint Pars.	*Subject & Date(s)*	*Act Sec(s).*	*Finding*
C-1, pars. 5(a), 7&10	Interrogation (11/21 & 12/17/80)	8(a)(1)	Not found
C-1, pars. 5(b),7&10	Proscription of union button display (11/80 & 12/80)	8(a)(1)	Found
C-1, pars. 5(c),7&10	Attempt to enlist employee to engage in espionage on union meetings (12/17/80)	8(a)(1)	Found
C-1, pars. 6(a)&(b), 8 & 10	Discharge of employee for refusal to engage in espionage on union meetings (12/17/80)	8(a)(1) & (3)	Found 8(a)(1) only
C-1, pars. 6(a)&(c), 9 & 10	Discharge of employee for testifying at Board-conducted Representation case hearing (12/17/80)	8(a)(1) & (4)	Not found
C-2, pars. 5(a)(i), 7 & 9	Threatening reprisals for union activities (4/22/81)	8(a)(1)	Found
C-2, pars. 5(a)(ii), 7 & 9	Threatening that no union would be permitted (4/22/81)	8(a)(1)	Found
C-2, pars. 5(a)(iii), 7	Interrogation (4/22/81)	8(a)(1)	Found
C-2, pars. 5(b), 7, & 9	Threatening reprisals for union activities (11/80)	8(a)(1)	Not found
C-2, pars. 5(c), 7, & 9	Interrogation (3/81-4/81)	8(a)(1)	Found
C-2, pars. 5(d), 7, & 9	Interrogation (12/80-3/81)	8(a)(1)	Not found as to Callan; found as to Ro-spopo & Leeper
C-2, pars. 6(a)&(c), 8 & 9	Reprimand for union activity (2/16/81)	8(a)(1)&(3)	Not found
C-2, pars. 6(b)&(c), 8 & 9	Imposition of more arduous work (4/22/81)	8(a)(1)&(3)	Not found

Upon the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted here.

2. By engaging in the acts hereinabove found in section II, of this Decision, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7, inviolation of Section 8(a)(1), of the Act, and continues to do so.

3. The aforesaid unfair labor practices affect, and each of them have affected, and unless permanently restrained and enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

4. It has not been established by substantial credible evidence, upon the record as a whole, that Respondent has violated the Act in any respect not found in section II, *supra*.

REMEDY

Respondent should be required to cease and desist from the unfair labor practices found herein, as well as from any like or related violation of the Act. Respondent should also be required to offer Sandra Lee Paquin reinstatement to her former or, if not available for proper reason, equivalent employment, and to make her whole for moneys, benefits (including expenses resulting from canceled hospitalization and other insurance coverages, if applicable), and seniority lost by reason of her discharge on December 17, 1980, together with interest, calculated in the manner explicated in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). Respondent should be required to

delete from its records references to that discharge. Respondent should be required to open its books to the Board's agents for compliance determination purposes. Finally, Respondent should post the usual informational notice to employees.

As to any violations alleged but not herein found, the complaints should in those respects be dismissed.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[17]

The Respondent, Howard Johnson Motor Lodge, South Bend Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their or other employees' membership in, affiliation with, sympathies for, or activities on behalf of any labor organization, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended.

(b) Prohibiting or proscribing the wearing or display on any article of clothing or belongings of any employees, of any conventional type union membership, affiliation, or sponsorship button, badge or emblem, in violation of Section 8(a)(1) of the Act.

(c) Threatening reprisal against employees by reason of union membership or contemplated membership, affiliation, sympathy, or activity.

(d) Threatening employees that no union will be permitted by Respondent to represent Respondent's employees for collective bargaining or other lawful purpose under said Act.

(e) Enlisting or attempting to enlist any employee or any supervisor to engage in spying or reporting on employees' union meetings or other lawful off-premises or off-duty-time concerted activities protected under said Act.

(f) Discharging, disciplining, or threatening to discharge or discipline any employee or any supervisor for refusing to disclose the identities of employees observed by him or her to attend any union meetings of employees or to engage in other lawful, off-premises and off-duty-time concerted activities protected under said Act.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any of their rights under Section 7 of said Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Offer to Sandra Lee Paquin immediate, full, and unconditional reinstatement to her former job with Respondent as chief or head housekeeper at its South Bend, Indiana, motel (or, if not available, a substantially equivalent job there), dismissing, if necessary for that purpose, any person hired in her place and instead; without prejudice to Sandra Lee Paquin's seniority and other rights, privileges, benefits, wage rates, and emoluments, including but not limited to any and all wage and pay scale increases and progressions since her discharge on December 17, 1980; and make her whole for any loss of income (including overtime, holiday and vacation pay, and reimbursement for all hospitalization, surgical, medical, and other payments or obligations incurred by reason of Respondent's cancellation, withdrawal, or nonpayment of any applicable insurance coverages or premiums in consequence of said discharge), together with interest, in the manner set forth in the Remedy section of this Decision.

(b) Expunge from all of Respondent's books, records, and files any entry or reference indicating or to the effect that said discharge of Sandra Lee Paquin was because of any wrongdoing, misconduct, delinquency, disloyalty, dereliction, or fault on her part; and refrain from so reporting or stating to any employer, prospective employer, employment agency, employment insurance office, reference seeker, or character or credit inquiry.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, wage rate records, overtime records, records of employees hired, records of jobs held by and payments made to personnel in its employ, and all work schedules, personnel records and reports, social security records, insurance records, and all other records and entries necessary or appropriate to determine the amount and extent of backpay and other sums and benefits due, as well as the adjustment of seniority required, under and the extent of compliance with the terms of this Order.

(d) Post at its motel premises in South Bend, Indiana, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply therewith.

IT IS FURTHER ORDERED that as to any alleged violations set forth in either of the complaints herein and not here found to have occurred, said allegations are hereby dismissed.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order which follows herein shall, as provided in Sec. 102.48 of those Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."